Supreme Court, U.S.
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No. 95-981

In The

Supreme Court of the United States

October Term, 1995

JUDITH M. PRITZLAFF,

Petitioner,

v.

ARCHDIOCESE OF MILWAUKEE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Wisconsin Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review the Wisconsin Supreme Court's decision, which dismissed petitioner's claims against the Archdiocese of Milwaukee arising out of an adult sexual relationship between the petitioner and a priest that allegedly occurred between 1959 and 1965, when that decision was based first on Wisconsin's statute of limitations, second on state public policy grounds and third on the First Amendment to the United States Constitution?

2. Does this Court have jurisdiction to review the Wisconsin Supreme Court's decision on the basis that the decision allegedly violates the petitioner's equal protection and due process rights when (a) neither the equal protection nor the due process challenge was presented to or ruled upon by the Wisconsin Supreme Court and (b) both claims are meritless?

PARTIES TO THE PROCEEDING

The parties before the Wisconsin Supreme Court were Judith M. Pritzlaff and the Archdiocese of Milwaukee. In addition, Reverend John T. Donovan and Arizona Health Care Costs Containment System and Health Care Financing Administration appeared in the proceedings before the lower courts.

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The respondent Archdiocese of Milwaukee ("Archdiocese") opposes the grant of a writ of certiorari to review the Wisconsin Supreme Court's decision in this case.

OPINION BELOW

The petitioner has requested review of the decision of the Wisconsin Supreme Court in *Pritzlaff v. Archdiocese of Milwaukee, et al.*, 194 Wis. 2d 303, 533 N.W.2d 780 (1995).

JURISDICTIONAL STATEMENT

The Wisconsin Supreme Court's decision was issued on June 27, 1995. The Wisconsin Supreme Court denied the petition for rehearing on September 19, 1995. The petitioner asserts that this Court has jurisdiction to review the judgment of the Wisconsin Supreme Court pursuant to 28 U.S.C. § 1257(a), and that the Court can entertain the petitioner's equal protection and due process challenges to the Wisconsin Supreme Court decision, raised for the first time in this petition, under *N.A.A.C.P. v. State of Alabama Ex. Rel. Patterson*, 357 U.S. 449 (1958).

This Court should not review the Wisconsin Supreme Court's decision in *Pritzlaff* because it was based upon adequate and independent state law grounds and the judgment will therefore remain unaltered even if this Court disagrees with the Wisconsin Supreme Court's interpretation of federal law. This Court should also decline to entertain the petitioner's due process and

equal protection challenges to the Wisconsin Supreme Court's decision because those challenges were not presented to the Wisconsin Supreme Court (or the lower courts), and because they are meritless.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Wis. Stats. § 330.205 (1963):

330.205 Within Three Years. Within three years:

> (1) an action to recover damages for injuries to the person for such injuries sustained on or after July 1, 1995 . . .

Wis. Stats. § 893.54 (1993-1994):

> **893.54 Injury To the Person.** The following actions shall be commenced within three years or be barred:
>
> (1) an action to recover damages for injuries to the person.

United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

Wisconsin Constitution, Article I, Section 18:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference

> with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

United States Constitution, Amendment 14:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

Judith M. Pritzlaff sued the Archdiocese of Milwaukee and Father John Donovan on November 12, 1992, seeking to recover for claims arising out of an adult sexual relationship that allegedly occurred between Father Donovan and Pritzlaff from 1959 to 1965. *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 303, 533 N.W.2d 780 (1995). Pritzlaff alleged that Father Donovan had used his relationship with Pritzlaff and his position as a priest to force and coerce her to have a sexual relationship with him without her consent. *Id.*, 194 Wis. 2d at 310. She further alleged that the psychological distress caused by the sexual advances and the coping mechanisms that she subsequently developed combined to cause her to suppress and be unable to perceive the existence, nature

or cause of her psychological and emotional injuries until approximately 1992. *Id.*

On April 26, 1993 the trial court granted the Archdiocese's motion to dismiss Pritzlaff's claims, finding that (1) Pritzlaff's respondeat superior and negligent supervision claims against the Archdiocese failed to state a claim upon which relief could be granted and (2) all of Pritzlaff's claims were barred by the statute of limitations and/or failed on public policy grounds. *Id.* at 311-312. On April 23, 1994, the Wisconsin Court of Appeals held that Pritzlaff's claims were not barred by the statute of limitations, and similarly reversed the trial court's finding that Pritzlaff could not state a claim for negligent supervision against the Archdiocese. *Id.* at 312. The court of appeals affirmed the trial court's decision that Pritzlaff could not state a respondeat superior claim against the Archdiocese, agreeing the alleged sexual acts were, as a matter of law, outside the scope of Father Donovan's employment relationship with the Archdiocese. *Id.* The Archdiocese petitioned the Wisconsin Supreme Court to review the Court of Appeals' decision on the statute of limitations and negligent supervision issues. Pritzlaff did not appeal the decision on respondeat superior, and that issue was therefore not reviewed by the Supreme Court. *Id.*

On review, the Wisconsin Supreme Court reversed the Court of Appeals' decision, affirming the trial court's dismissal of Pritzlaff's claims on statute of limitations, public policy and First Amendment grounds.

The Wisconsin Supreme Court found, first, that Pritzlaff's claims were untimely under Wisconsin's three year

statute of limitations, Wis. Stats. § 330.205 (1963) and its successor, Wis. Stats. § 893.54 (1993-94). Pritzlaff asserted that the statute of limitations should be tolled under Wisconsin's judicially created discovery rule (which tolls the statute of limitations in some circumstances when the claimant does not discover and is unable to discover the nature and cause of an injury) because Pritzlaff allegedly had "suppressed and been unable to perceive the existence, nature or cause of her psychological and emotional injuries until approximately April, 1992." *Id.* at 316. The Wisconsin Supreme Court disagreed, holding that the discovery rule did not apply:

> We conclude that Ms. Pritzlaff's claim does not qualify for the tolling of the statute of limitations provided by the discovery rule because Ms. Pritzlaff knew of all of the elements of her underlying claim against Father Donovan, at the latest, by the time the relationship between the two ended. *Id.*

The Wisconsin Supreme Court affirmed the dismissal of Pritzlaff's claims, second, on state public policy grounds:

> But here sound public policy requires that the discovery rule should not save a claim under the facts of this case. This court has stated that the discovery rule will apply only when allowing meritorious claims outweighs the threat of stale or fraudulent actions. [*Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 559, 335 N.W.2d 578 (1983)]. Extending the discovery rule to this case would cause unfairness to a defendant who is forced to attempt to defend a suit for emotional and psychological injuries in which the alleged

> conduct took place over 27 years ago and increases the potential for fraud. *Id.* at 323.

Having disposed of Pritzlaff's claims on statute of limitations and public policy grounds, the Wisconsin Supreme Court then turned to the merits of her claims, addressing the issue of whether a religious governing body could be liable for negligence in hiring, retaining, training or supervising clergy who commit acts which are outside the scope of their employment. The Court addressed the issue, despite the fact that it was *"moot in this particular case"* because the Court found that the issue was one of great public importance, which had been fully briefed by the parties, and because there was a conflict among different panels of the state court of appeals. *Id.* at 326 (emphasis added). The Court also noted that it had not yet determined whether a negligent supervision claim exists in Wisconsin under any circumstances, and that it would assume, but not decide, that such a claim did exist for purposes of addressing whether it could ever be applied in this situation. *Id.* at 326-327.

The Wisconsin Supreme Court concluded that the First Amendment to the United States Constitution prevents Wisconsin state courts from entertaining a claim that the Archdiocese was negligent in hiring or retaining Father Donovan:

> [T]he First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices. Therefore, Ms. Pritzlaff's claim against the

> Archdiocese is not capable of enforcement by the courts. *Id.* at 327.

The Court noted, further, that state court decisions supported its conclusion:

> Recent decisions of the courts of this state also support our conclusion that negligent hiring and retention claims cannot be heard by courts in this state for constitutional reasons. *Id.* at 329.

The Wisconsin Supreme Court never reached the other two issues now raised by the petitioner, whether the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution require the Wisconsin Supreme Court to apply its judicially created discovery rule to Pritzlaff's claims, because those issues were never presented to the lower courts or to the Wisconsin Supreme Court. (*See*, Plaintiff-Appellant's Brief to the Wisconsin Supreme Court, Appendix, Item 2). The petitioner did not even raise the equal protection and due process challenges in her Motion for Reconsideration to the Supreme Court of Wisconsin. (*See*, Plaintiff-Appellant's Motion for Reconsideration, Appendix at pages 3-4).

ARGUMENT

I. THE WISCONSIN SUPREME COURT'S DECISION TO DISMISS PRITZLAFF'S CLAIMS SHOULD NOT BE REVIEWED BECAUSE IT WAS BASED UPON INDEPENDENT STATE LAW GROUNDS ADEQUATE TO SUPPORT THE JUDGMENT AND, MOREOVER, BECAUSE THE WISCONSIN SUPREME COURT'S ANALYSIS OF THE FEDERAL CONSTITUTIONAL ISSUES WAS CORRECT.

A. *Pritzlaff* was Decided on Adequate and Independent State Grounds.

The Wisconsin Supreme Court dismissed the petitioner's claims because they were untimely under Wisconsin's statute of limitations and barred on state public policy grounds. The Wisconsin Supreme Court also dismissed Pritzlaff's negligent supervision claim against the Archdiocese on federal constitutional grounds. The court's decision to dismiss on statute of limitations and public policy grounds constitutes an independent state basis adequate to support the judgment, and the United States Supreme Court therefore should *not* exercise jurisdiction to review the case. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977) (a case decided on independent state law grounds will not be reviewed, even if it decides federal questions, because review would amount to nothing more than an advisory opinion); *Jankovich v. Indiana Toll Road Com.*, 379 U.S. 487 (1965) (an independent and adequate state ground of decision deprives the Supreme Court of jurisdiction).

A state court's decision that an action fails under the state statute of limitations is ordinarily not reviewable, even if federal questions are also reached, because the

state statute of limitations provides an adequate and independent state law basis for the decision. *See Seneca Nation v. Christy*, 162 U.S. 283 (1896) (decision that suit is barred by the state statute of limitations rested upon a distinct and independent ground, precluding review); *Elder v. Wood*, 208 U.S. 226 (1908); *Rogers v. Jones*, 214 U.S. 196 (1909); *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 101-102 (1973), *reh'g denied*, 414 U.S. 1138 (1974) (remanding case to the Oklahoma Supreme Court to clarify whether the Oklahoma statute of limitations was an independent basis for the court's decision, because "if that should prove to be the case, any decision by this Court would be advisory and beyond our jurisdiction.").

In this case, the Wisconsin Supreme Court disposed of Pritzlaff's claims first and foremost on state statute of limitations grounds. The court held that Pritzlaff's claims were barred by Wisconsin's three-year statute of limitations for negligence claims, and the court further held that Wisconsin's judicially created discovery rule would not save such claims. This Court should not review Wisconsin's decision, therefore, because the state statute of limitations constitutes an adequate ground for the judgment, independent of the federal constitutional issue, and the judgment would stand even if the Court ultimately disagreed with the Wisconsin Supreme Court's interpretation of the federal constitutional question.

This Court should also refuse to review the *Pritzlaff* Court's decision because the decision was also grounded in state public policy. Not only did the Supreme Court find that Pritzlaff's claims were time barred, but it also found that Wisconsin's discovery rule could not apply to such claims under any circumstances because to permit a

27-year old claim to survive would be contrary to Wisconsin's public policy:

> We conclude that to allow the claim to proceed against the Archdiocese based on Ms. Pritzlaff's allegations concerning Father Donovan despite the passage of 27 years since the end of the alleged relationship would be contrary to the public policy of this State. *Pritzlaff*, 194 Wis. 2d at 308.
>
> * * *
>
> [S]ound public policy requires that the discovery rule should not save a claim under the facts of this case. This Court has stated that the discovery rule will apply only when allowing meritorious claims outweighs the threat of stale or fraudulent actions. Extending the discovery rule to this case would cause unfairness to a defendant who is forced to attempt to defend a suit for emotional and psychological injuries in which the alleged conduct took place over 27 years ago and increase the potential for fraud. *Id.* at 323.

The Wisconsin Court's decision not to extend the application of the judicially created discovery rule to Pritzlaff's claims on state public policy grounds, like its decision that the claim fails under the state statute of limitations, is a sufficient and independent state ground which bars further review in the United States Supreme Court.

If there is any question as to whether the statute of limitations and public policy grounds form an adequate and independent basis for the judgement, moreover, this Court need only look to the Wisconsin Supreme Court's decision in *Pritzlaff*. Before the Supreme Court addressed

the issue of whether a negligent supervision claim against the Archdiocese survived a constitutional challenge, it first explained that it was addressing the issue, *even though it was moot*, because it was a matter of importance to the state:

> Since we conclude that Ms. Pritzlaff's claim is time barred, we could end our analysis at this point. However, the question of whether a religious governing body is liable for negligence in hiring, retaining, training or supervising their "employees" (clergymen) who commit acts which are outside the scope of their employment is a matter of great public importance and has been fully briefed by the parties. . . . Moreover, the decision of the Court of Appeals in this case is in conflict with the decision issued the same day by a different panel of the Court of Appeals. . . . Thus, *although the point is moot in this particular case*, it is an issue which led this court to grant review in this case. Therefore, a decision is appropriate. *Pritzlaff*, 194 Wis. 2d at 326 (citations omitted) (emphasis added).

No decision by this Court will render Pritzlaff's claims viable under Wisconsin law, and the Court should therefore decline the petitioner's invitation to issue an advisory opinion.

B. The Wisconsin Supreme Court Properly Held that a Negligent Supervision Claim Against the Archdiocese of Milwaukee Cannot be Maintained Consistent with the First Amendment of the United States Constitution and Article I, Section 18 of the Wisconsin Constitution.

In addition to dismissing Pritzlaff's claims on statute of limitations and public policy grounds, the Wisconsin Supreme Court also held that Pritzlaff could not maintain a negligent supervision claim against the Archdiocese of Milwaukee consistent with the First Amendment to the United States Constitution:

> [T]he tort of negligent hiring and retention may not be maintained against a religious governing body due to concerns of excessive entanglement and. . . . The tort of negligent training or supervision cannot be successfully asserted in this case because it would require an inquiry into church laws, practices and policies. *Pritzlaff*, 194 Wis. 2d at 331.

As an initial matter, this Court should also decline review of the constitutional issue because the decision on that issue was based not only on the U.S. Constitution but also on the Wisconsin Constitution. *See Jankovich v. Indiana Toll Road Com.*, 379 U.S. 487, 491-492 (1965) ("[E]ven though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment"). The respondents had urged the Wisconsin Supreme Court to find that the negligent supervision claim was barred both

under the First Amendment to the United States Constitution and under Article I, Section 18 of the Wisconsin Constitution, (*see* Respondent's Brief to the Wisconsin Supreme Court, Appendix pages 43-51), and the Wisconsin Court in fact referred to state court decisions in support of its conclusion. *See Pritzlaff*, 194 Wis. 2d at 329. The State Constitution therefore provides an adequate and independent basis for the rejection of the negligent supervision claim.

In any event, this Court should decline review of the Wisconsin Supreme Court's ruling that a negligent supervision claim cannot be maintained against the Archdiocese because the court properly held that the First Amendment to the United States Constitution and Article 1, Section 18 of the Wisconsin Constitution preclude the Wisconsin courts from recognizing the tort of negligent supervision in this context. To support a negligent supervision claim, the plaintiff would have to establish that the Archdiocese was negligent in selecting or retaining Father Donovan, because he in turn was incompetent or otherwise unfit. *Midwest Knitting Mills, Inc. v. U.S.*, 950 F.2d 1295, 1298 (7th Cir. 1991).[1] The courts cannot constitutionally determine what makes one competent or fit to

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[1] Case law from other jurisdictions must be relied upon to define the elements of this tort because, as the *Pritzlaff* Court noted, the Wisconsin Supreme Court has not determined whether such a cause of action exists in Wisconsin in *any* context. *Pritzlaff*, 194 Wis. 2d at 326. That fact, incidentally, provides further evidence that a decision that the Wisconsin Supreme Court erroneously determined the First Amendment issue would not result in reversal of the judgment in *Pritzlaff*.

act as a Catholic priest, however, and the claim therefore cannot be recognized.

This Court has consistently held that the Free Exercise clause of the First Amendment prohibits government interference into issues surrounding the selection of clergy by religious institutions, since such selections involve legitimate religious beliefs. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) (it is the function of church authorities to determine what the essential qualifications of a clergy person are and whether the candidate possesses them). *See also Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 711-12 (1976) (*citing Gonzalez*); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952) ("Freedom to select the clergy . . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.")[2]

Under *Gonzalez*, it is clear that the free exercise rights of the Archdiocese and the Catholic Church are at issue whenever a court undertakes to address the selection, supervision and training of Catholic priests. It is the function of the Catholic Church to determine what the

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[2] *See also Olston v. Hallock*, 55 Wis. 2d 687, 201 N.W.2d 35 (1972) (court could not constitutionally review a religious institution's decision to terminate a minister); *Black v. St. Bernadette Congregation*, 121 Wis. 2d 560, 565, 360 N.W.2d 550 (Ct. App. 1984) (matters of internal church government are at the core of ecclesiastical affairs and as such are beyond the province of judicial review); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) (the right to choose clergy without government restriction underlies the well-being of religious community).

essential qualifications of its priests are and it is also the function of Church authorities to determine how to supervise and train these priests to best meet the needs of the Church. This Court must accept those determinations as conclusive, and cannot constitutionally rule that the Archdiocese improperly trained, selected or supervised its priests.

Not only are free exercise rights at issue, moreover, but the First Amendment also prohibits courts from determining whether religious authorities negligently supervised clergy because such a determination may involve civil authorities in unconstitutional excessive entanglement with religious authorities. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 711-712 (1976), the Supreme Court explained that where the resolution of civil disputes cannot be made without extensive inquiry by civil Courts into religious law and policy, the First and Fourteenth Amendments mandate that the civil courts not disturb decisions of religious authorities. *Id.* at 708. And in *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991), the court specifically rejected a negligent supervision claim against religious authorities on excessive entanglement grounds.

In *Schmidt*, the plaintiff alleged that religious authorities had negligently supervised a pastor who had initiated sexual contact during a counseling relationship. The court held that the First Amendment prohibited it from determining whether the ecclesiastical authorities negligently supervised the pastor, due to the problem of excessive entanglement:

> Any inquiry into the policies and practices of the church defendants in hiring or supervising their clergy raises the same kinds of First Amendment problems of entanglement discussed above, which might involve the court in making sensitive judgments about the propriety of the church defendant's supervision in light of their religious beliefs.
>
> * * *
>
> It would therefore also be inappropriate and unconstitutional for this court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.

Id. at 332.[3]

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[3] Similarly, in *Dausch v. Rykse*, 1993 U.S. Dist. LEXIS 1448, *20 (N.D. Ill.), *aff'd in part, rev'd in part*, 52 F.3d 1425 (7th Cir. 1994), a federal district court applying Illinois law ruled that a similar negligent supervision claim failed, among other reasons, because of the potential for excessive entanglement. The Seventh Circuit Court of Appeals affirmed this decision without specifically addressing whether such a claim is barred by the First Amendment. In a dissent, however, Judge Ripple argued that, while an inquiry could be made into the church's decision to employ the clergyman in a purely secular capacity – as a psychotherapist – no inquiry could constitutionally be made into the decision of the church defendants to retain the clergyman to perform services in any way religious in nature. *See also Roppolo v. Moore*, 644 So.2d 206, 208 (La. Ct. App. 4th Cir. 1994) (recognizing the chilling effect on the free exercise of religion if the courts are to determine after the fact that ecclesiastical

The *Pritzlaff* court similarly rejected negligent supervision claims on First Amendment grounds because permitting such claims would invite excessive entanglement of the state into religious matters by permitting a court to review the sufficiency of the Archdiocese's supervision of its priests. Wisconsin had previously recognized that it cannot constitutionally review the decision of a religious institution to terminate a minister (*Olston v. Hallock*, 55 Wis. 2d 687, 698, 201 N.W.2d 35 (1972)) and, this decision – that the court cannot constitutionally review the decision to hire, or how to supervise, a priest – was a logical extension of that rule. The trial courts are not equipped, nor should they be required, to inquire into the essential characteristics of a priest or how the Church should screen and supervise its clergy.

The petitioner's attack on the reasoning of the Wisconsin Supreme Court is based largely on false premises and unsupported assumptions. The most fundamental of these unsupported assumptions is the implicit argument that there *must* be a way to hold the Archdiocese liable for abuse allegedly committed by a priest. In the first place, nothing in *Pritzlaff's* First Amendment analysis prevents a lawsuit against the allegedly intentional tortfeasor. More importantly, there is no basis for the implication that there *must* be a tort of negligent supervision.[4] As set forth above, the *Pritzlaff* court assumed

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authorities negligently supervised or retained a member of the clergy).

[4] The petitioner claims that there is a "basic and universal premise that religious organizations are liable for their torts." Not in Wisconsin: until 1963 – four years into this allegedly

without deciding that such a claim would be recognized in Wisconsin (it has not yet been recognized – *Midwest Knitting Mills, Inc. v. U.S.*, 950 F.2d 1295 (7th Cir. 1991)), and then held that even if it were recognized it would not be applied against religious institutions. It is the province of the Wisconsin Supreme Court to decide the theories of liability under which an employer may be held liable for the torts of its employees and as of now it has not recognized a tort of negligent supervision in any circumstances.

In addition, the petitioner misleadingly argues that the religious beliefs of the Archdiocese would not be implicated in a lawsuit for its allegedly negligent supervision of a priest alleged to have abused a parishioner because "the Archdiocese does not and cannot claim that sexual contact between a priest and parishioner is mandated, authorized or supported by church law." (Petition p. 6). In fact, of course, the religious beliefs of the Catholic Church *prohibit* sexual contact between a priest and a parishioner, and the religious beliefs of the Church *are* implicated both when that prohibition is violated and when the state attempts to regulate the Archdiocese's response to (and alleged failure to foresee and prevent) the violation. The religious beliefs that are implicated include the choice of how to respond to such a violation and more fundamentally the right of the Archdiocese to choose its priests, and to determine when to retain them and how to supervise them. That much should have been

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tortious six year relationship – religious organizations such as the Archdiocese enjoyed charitable immunity. *See Widell v. Holy Trinity Catholic Church*, 19 Wis. 2d 648, 121 N.W.2d 249 (1963).

obvious to the petitioner from the arguments that the Archdiocese made to the Wisconsin Supreme Court, and the Wisconsin Supreme Court's decision.[5]

Finally, the petitioner demonstrates a fundamental misunderstanding of the *Pritzlaff* court's decision, and of First Amendment jurisprudence, when she states time and time again, in a number of not so different ways, that holding the church liable for alleged negligent supervision of priests would not in any way impinge upon the church's discretion in selecting and supervising priests. (*See, e.g.*, Petition, p. 20, "The church's authority to govern the church is one thing; immunity for secular harm to third parties based upon these decisions is quite another." *See also*, p. 23, "While the church is free to determine who is competent and qualified to be a priest, and that decision is binding upon the party seeking such appointment under church law governance, if the church's appointment results in secular harm to a third party, the church is

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[5] The petitioner also launches an unfortunate and unwarranted attack on the Wisconsin Supreme Court, describing the Wisconsin Supreme Court's decision as, among other things, "gratuitous," "irrelevant," "jurisdictionally unfortunate" and "unsupported and self-serving." The petitioner also accuses the Wisconsin Supreme Court of relying "almost exclusively on a Law Review article" (Petition p. 7) and relying "upon selected quotes . . . taken out of context" from United States Supreme Court decisions. This insulting attack on the Wisconsin Supreme Court has no place in appellate advocacy, and it is meritless. The Wisconsin Supreme Court in *Pritzlaff* was presented with and presumptively considered the relevant authority. The court even acknowledged that other courts had reached contrary decisions, but declared that "we find these cases unpersuasive." *Id.* at 331.

liable.") In reality, as the Wisconsin Supreme Court properly held, recognizing a negligent supervision claim in these circumstances would require courts not only to involve themselves in an impermissible review of the selection and supervision of clergy after the fact, but also involve the courts in legislating the kind of selection and training criteria that are acceptable in the first place. The resolution of such a claim would require the court to inquire into religious disputes and impose upon the internal church body the State's preference as to who is qualified to serve as a cleric. That is impermissible.

II. THE SUPREME COURT SHOULD NOT ACCEPT REVIEW TO DETERMINE WHETHER THE WISCONSIN SUPREME COURT'S DECISION VIOLATES EQUAL PROTECTION OR DUE PROCESS BECAUSE THOSE ISSUES WERE NOT PRESENTED TO OR RULED UPON BY THE WISCONSIN SUPREME COURT AND BECAUSE THE ARGUMENTS ARE PLAINLY WITHOUT MERIT.

The Supreme Court should not issue a writ of certiorari based upon petitioner's argument that the Wisconsin court's decision violates her equal protection and due process rights because those issues were not presented to or ruled upon by the Wisconsin Supreme Court.

As a general proposition, in order to obtain review pursuant to 28 U.S.C. § 1257(a), a petitioner must first present a federal claim to the state court and obtain a ruling from the state court. *See, e.g., Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (The Supreme Court will not pass upon a federal claim unless the claim was adequately presented in the

state system, and when the state court has failed to pass upon a federal question it is assumed that it was due to want of proper presentation); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76 (1988) (the Supreme Court will not decide federal claims that were not pressed or passed upon below). As is evident from petitioner's brief to the Wisconsin Supreme Court and her brief on rehearing, her equal protection and due process claims were never presented to the Wisconsin Supreme Court. (Brief of Plaintiff-Appellant Judith M. Pritzlaff Appendix at pages 43-51; and, Plaintiff-Appellant's Motion for Reconsideration Appendix at pages 52-65). This Court should therefore not entertain petitioner's challenge to the Wisconsin Supreme Court's decision on equal protection or due process grounds.

The Court should also decline to entertain a challenge to the Wisconsin court's decision on equal protection and due process grounds because petitioner's claims are meritless. To sustain Supreme Court jurisdiction under 28 U.S.C. § 1257(a), a federal question may not be one of mere form, but rather it must be real and substantial. *See Ennis Water Works v. Ennis*, 233 U.S. 652 (1914); *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952). A federal question is not substantial if it is plainly without foundation or merit. *Ennis Water Works*, 233 U.S. at 658.

The petitioner argues that *Pritzlaff* violates equal protection by creating an impermissible distinction between victims of incest and victims of abuse by a cleric. The petitioner's equal protection claim is meritless because *Pritzlaff's* decision not to apply the statute of limitations to non-incest sexual assault cases rests upon the rational and justifiable distinction between incest victims and other abuse victims. *See, e.g., Clements v. Fashing*, 457 U.S.

957, 967 (1982) ("only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution"); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408 (1982) (rejecting equal protection challenges to New Jersey statute of limitations because it was rationally related to legitimate government ends).

It is neither arbitrary nor irrational for the Wisconsin courts to distinguish between the unique relationship of child to parent and the relationship of adult parishioner to priest, or for that matter the relationship of any person of any age with an adult in a position of arguable trust or authority, such as priests, school teachers, psychologists or police. In fact, the Wisconsin legislature has recognized incest as a separate type of crime warranting specific and separate treatment in this identical context (*see* Wis. Stats. § 893.587 codifying the discovery rule in incest cases) and in other contexts, *see e.g.*, Wis. Stats. § 948.06. The legislature has also recognized the unique nature of the parent-child relationship, or guardian-child relationship, by providing for special laws governing that relationship such as Wis. Stats. § 948.06(2), which makes it a felony for a parent or guardian to fail to act upon knowledge of sexual abuse. *See also* Wis. Stats. §§ 948.20 and 948.21, 948.22. The decision to create a special discovery rule for incest cases but not for other cases of sexual assault, like the other laws directed specifically at the parent-child relationship, is based on a recognition of the unique nature of that relationship, and therefore does not violate equal protection.

The petitioner's due process argument warrants even less response. The petitioner appears to be arguing, first, that the dismissal of her claim short of trial in and of

itself violates due process. This Court long ago made it clear, however, that dismissal of claims short of trial is not a violation of due process rights: "It was not a denial of a right protected by the Constitution of the United States to refuse a jury trial." *Iowa Central Railway Co. v. Iowa*, 160 U.S. 389 (1896).

The second argument, that the *Pritzlaff* decision somehow violates the due process prohibition against "requiring a person to swear to a fact that the individual cannot be expected to know," is sheer nonsense. The petitioner cites *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961) for the proposition that *Pritzlaff* violates her due process rights. *Gremillion* invalidated a law that *required* a person registering an organization with the state to file an affidavit stating that none of the officers of any out-of-state association with which it is affiliated is a member of a communist or subversive organization – a feat impossible for an organization with many thousands of members. This petitioner, on the other hand, was not *required* by the state court to swear to anything, and the petitioner has cited no authority that otherwise undermines the authority of a state court to dismiss claims on statute of limitations grounds on the pleadings.

The real point of this supposed due process argument is that, had the Wisconsin Supreme Court properly construed the pleadings under controlling Wisconsin law, it would have determined that the discovery rule applies. That is not a due process challenge, but rather a request that the U.S. Supreme Court overturn *Pritzlaff* because the state court supposedly erroneously applied its own law. As set forth above, however, this Court is not in the business of reviewing state court decisions construing

state law, and the Wisconsin Supreme Court is under no federal obligation to extend its statute of limitations for 27 years based upon allegations such as those set forth by *Pritzlaff*, or any other allegations. The Wisconsin Supreme Court has determined that the state court judicially crafted discovery rule does not apply under these circumstances, and cannot apply on public policy grounds, and this Court is not free to review and overturn that decision on the basis that the Wisconsin court supposedly erroneously applied its own standards.

The equal protection and due process claims raised by the petitioner are plainly without foundation or merit, and the Supreme Court should not exercise jurisdiction under 28 U.S.C. § 1257 on so flimsy a basis.

CONCLUSION

This Court should decline the petitioner's invitation to review the Wisconsin Supreme Court's decision in *Pritzlaff v. Archdiocese, et al.*, because that decision rests, at its core, on independent and adequate state law grounds. Moreover, this Court should not entertain equal protection and due process challenges to the state court action when those challenges were not first presented to the state court. The petition should be denied.

Respectfully submitted this 19th day of January, 1996.

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SUPREME COURT OF WISCONSIN

JUDITH M. PRITZLAFF,

Plaintiff-Appellant,

v.

DISTRICT I
Case No. 93-1846
Trial Court Case No.
92-CV-016110

ARCHIDIOCESE OF MILWAUKEE,
Defendant-Respondent-
Petitioner,
REVEREND JOHN T. DONOVAN,
Defendant-Respondent,
ARIZONA HEALTH CARE COSTS
CONTAINMENT SYSTEM AND HEALTH
CARE FINANCING ADMINISTRATION,
Defendants.

BRIEF OF DEFENDANT-RESPONDENT-PETITIONER ARCHDIOCESE OF MILWAUKEE

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STATEMENT OF ISSUES

Issue No. 1: Does the discovery rule toll the running of the statute of limitations for 27 years in a case where the last tortious act allegedly occurred in 1965 and the plaintiff was always aware of the alleged breach of duty and the identity of the tortfeasor?

How Presented: Plaintiff-appellant Pritzlaff appealed a dismissal by the trial court, and the issue was briefed before the court of appeals.

How Decided: The court of appeals reversed the trial court, holding that it was error to conclude, applying the discovery rule, that plaintiff had failed as a matter of law to exercise reasonable diligence in discovering the connection between her injury and the alleged acts.

Issue No. 2: Did the trial court properly dismiss this 27 year old claim on public policy grounds?

How Presented: Pritzlaff appealed an adverse ruling; briefed by the parties before the court of appeals.

How Decided: The court of appeals reversed the trial court, holding that a sufficient factual basis was not presented for considering, evaluating and resolving the public policy issues involved in this case.

Issue No. 3: Did the trial court properly dismiss a claim for negligent supervision against the Archdiocese of Milwaukee, on the basis that Wisconsin has yet to recognize such a claim?

How Presented: Pritzlaff appealed an adverse ruling; briefed by the parties before the court of appeals.

How Decided: The court of appeals reversed the trial court, holding that the court of appeals has lawmaking power to recognize a claim for negligent supervision under these circumstances.

STATEMENT OF THE CASE

The plaintiff, Judith Pritzlaff, started this action in 1992 to recover for injuries arising out of an adult relationship she allegedly had with a priest beginning in 1959 and ending in 1965. The trial court, the Honorable John G. Bartholomew, dismissed the action on statute of limitations (and other) grounds. The court of appeals reversed, holding that it was error for the trial court to rule that the plaintiff, who was always aware of the alleged tortious conduct, *should* have discovered the nature and cause of her injury at some point more than three years prior to filing suit. The court of appeals also held that it was error to dismiss this 27 year old claim on public policy grounds

before a full factual determination at trial. Finally, the court of appeals held that it was error to rule that the plaintiff could not state a claim for negligent supervision against the Archdiocese of Milwaukee, holding instead that Wisconsin *does* recognize such a claim. This Court should reverse each of those rulings, and sustain the trial court's dismissal.

The plaintiff brought this suit against the Archdiocese of Milwaukee and Father John Donovan seeking to recover damages for a six year sexual relationship she allegedly had with Father Donovan thirty years ago. (Amended Complaint, App. p. 26, at ¶ 8).[1] This relationship allegedly began in 1959 when the plaintiff was an adult, and continued through 1965. (*Id.*). The plaintiff does not allege that she was sexually assaulted during this relationship. Realizing that a consensual sexual relationship is no grounds for a tort claim, however, the plaintiff ambiguously alleges that Father Donovan used "his position as a priest to force and coerce the plaintiff to have a sexual relationship with him without her consent." (*Id.* at ¶ 9).

As her theory of recovery against the Archdiocese of Milwaukee, the plaintiff asserted a respondeat superior claim and a negligent supervision claim. The plaintiff alleges that the Archdiocese had a duty:

> to admit only qualified candidates into the priesthood [and] properly test and screen candidates for the priesthood and priests to ascertain

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[1] All documents referred to in this brief (except published decisions) appear in the Petitioner's Appendix.

> if such persons had an illness or sexual inclination which caused a priest to be sexually attracted to teenage girls/young women. . . . (*Id.* at ¶ 16).

The plaintiff further alleges that the Archdiocese knew or should have known that Father Donovan "had a sexual problem prior to 1959." (*Id.* at ¶ 20).

The plaintiff did not sue during the course of the 6 year alleged relationship, from 1959 to 1965, nor did she sue immediately after it ended. Rather, she waited 27 years, until November of 1992, to bring this lawsuit. (Complaint, App. p. 33).

The plaintiff attempts to avoid the obvious statute of limitations bar presented by this 27 year delay by invoking the discovery rule. To invoke the discovery rule, however, the plaintiff does not allege that she repressed memory of this six year relationship, but rather alleges that this relationship caused psychological injuries which she was unable to discover until 1992:

> As a result of the psychological distress caused by the sexual advances and the coping mechanisms which were subsequently developed by Judith M. Pritzlaff, she has suppressed and been unable to perceive the existence, nature or cause of her psychological and emotional injuries until approximately April, 1992. (Am. Complaint at ¶ 11).

The Archdiocese filed a motion to dismiss, and Father Donovan joined the motion, contending that the plaintiff's complaint should be dismissed as untimely. (Brief in Support of Motion of the Archdiocese, App. p. 44, at 5). The Archdiocese also argued that the plaintiff's

complaint failed to state a claim either (a) for respondeat superior, because such a sexual relationship is clearly outside the scope of a priest's employment, or (b) for negligent supervision, because (i) the underlying conduct of Father Donovan was not tortious; (ii) Wisconsin does not recognize a claim for negligent supervision and should not recognize such a claim; and (iii) the plaintiff did not adequately plead such a claim. (*Id.* at 5-13).

In a memorandum decision filed on April 26, 1993, Judge Bartholomew dismissed the plaintiff's complaint. (Decision, App. p. 36; attaching Order filed May 26, 1993). The court dismissed the respondeat superior and negligent supervision claims against the Archdiocese as a matter of law, adopting the briefs of the Archdiocese as the basis for the decision. (*Id.* at 1-2). The court concluded that defendant Donovan could not have been acting within the scope of his employment, and that there was no basis to hold the Archdiocese liable on a theory of negligence, noting parenthetically that "it is most improbable that the Archdiocese, before Donovan was admitted to the seminary, should have foreseen that he had 'fancies concerning young women' or that Donovan had 'a sex problem' which did not manifest itself until 1959." (*Id.* at 2).

In addition to dismissing the claims against the Archdiocese for failure to state a claim, the court also found that all claims were barred by the statute of limitations, because the plaintiff had failed to exercise reasonable diligence in pursuing her claims, and on public policy grounds. (*Id.* at 4-7). The trial court explained that, although the plaintiff alleged that for 27 years she was unable to discover a nexus between her alleged injury

and the relationship, during this 27 year period the plaintiff was married, had children and was divorced or separated, all of which caused severe emotional distress for which she now blames the defendants. The court concluded that she did not exercise due diligence in discovering the connection, which she now claims to have discovered in 1992, between her emotional distress and the relationship which ended 27 years prior. (*Id.* at 5). The court also found that the claim should be dismissed on public policy grounds, citing *Coffey v. Milwaukee*, 74 Wis. 2d 526, 541, 247 N.W.2d 132 (1976).

On August 23, 1994 the Court of Appeals, District I, issued its opinion reversing the trial court's dismissal of all claims on statute of limitations and public policy grounds, and reversing the trial court's dismissal of the negligent supervision claim.[2] (App. p. 1). Despite the fact that the plaintiff was aware at all times of the alleged sexual relationship, the court of appeals found that her professed inability to relate her knowledge of that relationship to her injuries presented a factual issue inappropriate for determination on a motion to dismiss. The court therefore found that it was error for the trial court to determine, as a matter of law, that the plaintiff had failed to exercise reasonable diligence in discovering the cause of her injuries.

The court of appeals also reversed the trial court's decision to dismiss the action on public policy grounds. The court found that, in this case, a sufficient factual

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[2] The court of appeals affirmed the trial court's dismissal of the respondeat superior claim, and neither the petitioner nor the plaintiff has sought review of that decision.

basis was not presented for considering, evaluating and resolving the public policy issues involved in the case, and remanded for a full factual determination at trial.

Finally, the court of appeals reversed the trial court's dismissal of the negligent supervision claim, finding that Wisconsin should recognize a tort of negligent supervision under the circumstances presented in this case.[3]

ARGUMENT

The Supreme Court should reverse the decision of the court of appeals and affirm the trial court's dismissal on all grounds. The trial court correctly ruled, on a motion to dismiss, that the plaintiff's 27 year old claims were barred by the statute of limitations. The trial court also properly dismissed the claims on public policy grounds, and had the authority to do so on a motion to dismiss. Finally, the trial court properly dismissed the negligent supervision claim for failure to state a claim, and this Court should now refuse to recognize a cause of action for negligent supervision under the circumstances presented in this action.

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[3] Judge Sullivan, writing for the court, concluded that the negligent supervision claim stated no ground for relief because the Wisconsin Supreme Court had not explicitly recognized the tort of negligent supervision. Judge Fine, in a concurrence joined by Judge Schudson, disagreed, and that concurrence therefore constituted the opinion of the court on the negligent supervision issue.

I. THE PLAINTIFF'S CLAIMS WERE PROPERLY DISMISSED AS UNTIMELY.

The trial court dismissed the plaintiff's claims as untimely, holding that the plaintiff had failed to exercise reasonable diligence in pursuing her claim. This court should affirm that decision, first, because the discovery rule does not even apply to claims such as this, where the plaintiff is always aware of (a) the alleged breach of duty, (b) the identity of the tortfeasor and (c) some harm.[4] Even if the discovery rule does apply, second, the trial court properly ruled as a matter of law that the plaintiff, in the exercise of reasonable diligence, *should* have known of the nature and cause of her injury.

A. The Discovery Rule Does Not Toll The Running Of The Statute Of Limitations Where The Plaintiff Always Knows Of The Alleged Breach Of Duty And The Identify Of The Tortfeasor.

The plaintiff's claims, claims for injuries to the person, should have been brought within three years of the date of injury (1959 – 1965) under Wis. Stat. § 330.205 and its successor, § 893.205 (1965).[5] The plaintiff's claims,

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[4] *See e.g. Lecander v. Billmeyer*, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992) (the reviewing court may affirm a circuit court's decision even if the circuit court reached the result for different reasons).

[5] The applicable statutes of limitations are those that were in place when the alleged tortious activity occurred. *Kohnke v. St. Paul Fire & Marine Ins. Co.*, 144 Wis. 2d 352, 424 N.W.2d 191 (1988); *Betthauser v. Medical Protective Co.*, 172 Wis. 2d 141, 493 N.W.2d 40 (1992).

therefore, should have been filed in 1968, at the latest. Instead, they were filed in 1992, 27 years after the last alleged tortious act.

Realizing that the limitation period has long since expired, the plaintiff attempts to keep this 27 year old claim alive by resorting to the "discovery rule." To justify this untimely filing, however, the plaintiff does not allege that she was unaware of the identify of the tortfeasor or of the alleged tortious act – she admits that she was able to recall the relationship. Rather, the plaintiff has claimed that, despite this awareness, she was unable to connect her knowledge of the acts with her emotional harm.[6]

This court should affirm the trial court's dismissal of this action on statute of limitations grounds because the plaintiff's cause of action accrued in 1965, and expired in 1968. In Wisconsin, a cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it. *Meracle v. Children's Serv. Socy. of Wis.*, 149 Wis. 2d 19, 437 N.W.2d 532 (1989). If this adult relationship was tortious (a disputed question of law),

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[6] The respondent alleged that she was unable to perceive the existence, nature or cause of her psychological and emotional injuries until 1992, but at the same time made the inconsistent allegation that Defendant Donovan caused her to suffer emotional distress by causing the break-up of her marriage and separation from her children. (Amended Complaint, ¶¶ 10, 11). The trial court reasonably interpreted these inconsistent allegations as an acknowledgement of awareness of injury, but as an allegation that the plaintiff was unable to connect the alleged acts with the resulting emotional harm until 1992. (*See*, Decision at 3).

then Pritzlaff had a cause of action in 1965. She had a claim for damages arising out of what she now describes as being "coerced" into a 6 year sexual relationship, she knew against whom to enforce that claim, and she had the right to attempt to enforce her claim.

While the plaintiff attempts to invoke the discovery rule, moreover, this court has never held that the discovery rule applies to cases such as this where the plaintiff always knew of some breach of duty, and of the identify of the alleged tortfeasor. This court created the discovery rule in *Hansen*, and clarified it in *Borello*, to remedy situations in which the plaintiffs knew that they were experiencing a harm, but could not discover that a duty owed to them had been breached.[7] In *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983), an individual could not discover that her injury was caused by the defendant's malfunctioning IUD until a doctor removed the IUD and informed the plaintiff that it had caused her injury. While the plaintiff knew in that case that she had an injury, and knew or could know the identity of the alleged negligent actor, she had no way of knowing that the actor had breached a duty to her until the doctor

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[7] The court has also applied the discovery rule to cases where the plaintiff was unable to identify the tortfeasor. *See, Kolpin v. Pioneer Power & Light Co.*, 162 Wis. 2d 1, 469 N.W.2d 595 (1991) (applying discovery rule to case where plaintiff eventually discovered, through process of elimination, that stray voltage from defendant's plant was cause of problems with herd); *Spitler v. Dean*, 148 Wis. 2d 630, 436 N.W.2d 308 (1989) (applying discovery rule to case where plaintiff was assaulted in February of 1984, but did not learn of the identify of his assailant until December of 1985).

removed the IUD. Similarly, in *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 388 N.W.2d 140 (1986), the plaintiff was experiencing an injury and suspected that her furnace was the cause, but had no confirmation, because other physicians told her the furnace was not the cause, until her physician diagnosed her with metal fume fever. Again the plaintiff knew of the injury and the actor and even suspected a breach of duty, but had no way to confirm that breach of duty until diagnosed.

In this case, unlike *Hansen* and *Borello*, the plaintiff had nothing left to discover in 1965, and the discovery rule does not apply to preserve her claims. She allegedly knew that she and Father Donovan had just ended a six year relationship, which she claims was tortious. She therefore knew in 1965 of the alleged breach of duty – the relationship – and of the identify of the alleged tortfeasor – Fr. Donovan. *Hansen* and *Borello*, which held that the statute of limitations was tolled until the plaintiff could discover that someone had breached a duty, simply do not apply to cases where the plaintiff is aware for 27 years of the allegedly tortious acts.

B. The Plaintiff Failed To Exercise Reasonable Diligence In Discovering Her Claims.

If the discovery rule does apply, the trial court properly dismissed this claim as a matter of law on the basis that the plaintiff should have discovered her injury. Under Wisconsin law, a cause of action accrues when the plaintiff discovers, *or* in the exercise of reasonable diligence should have discovered, the fact of the injury and that the injury was probably caused by the defendant's

conduct. *Borello v. United States Oil Co.*, 130 Wis. 2d 397, 420, 388 N.W. 2d 140 (1986); *Hansen v. A. H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983). The latter portion of the rule (which holds that claims accrue when they should have been discovered) is designed to protect defendants from stale or fraudulent claims:

> [T]he discovery rule . . . will not leave defendants unprotected from stale and fraudulent claims. Under the rule, a claim accrues when the injury is discovered or reasonably *should* have been discovered. Therefore, it does not benefit claimants who negligently or purposefully fail to file a timely claim.

Id. at 559 (emphasis in original).

Applying this rule, the trial court found that the plaintiff's claims were barred as a matter of law because, in the exercise of reasonable diligence, she *should* have discovered the connection between the alleged acts and her resulting injuries, since she was aware at all times of the alleged tortious acts. The court of appeals reversed, holding that the plaintiff's professed inability to connect the alleged tort with the alleged injury presented an issue of fact, and it was therefore error to rule as a matter of law that the claim was untimely.

Other decisions from this Court and the court of appeals, however, support the trial Court's decision to treat the issue of whether the plaintiff exercised reasonable diligence in discovering her claim as a matter of law. In *Hennekens v. Hoerl*, 160 Wis. 2d 144, 465 N.W.2d 812 (1991) this Court affirmed the trial court's decision on summary judgment that, as a matter of law, the plaintiff had failed to exercise reasonable diligence in discovering

his claim. *Id.* at 161, 167. The Court explained that when the facts and reasonable inferences that can be drawn from the facts are not in dispute, whether the plaintiff has exercised reasonable diligence is a question of law. *Id.* at 161. *See also, Byrne v. Bercker*, 176 Wis.2d 1037, 1045, 501 N.W.2d 402 (1993) (where the facts, even though material, are disputed, those facts nevertheless become irrelevant if, in giving full benefit to the party against whom summary judgment is sought, the claim nevertheless is barred as a matter of law). The Court found that the plaintiff's claim against his attorney for negligent representation in negotiating an agreement to purchase property accrued on the date that the plaintiff received notice of intent to foreclose from the seller, holding as a matter of law that it was *not* reasonable for the plaintiff to ignore such a letter:

> Instead of contacting an attorney to determine why Crotteau was pressing for payment for land Hennekens had not received, Hennekens simply ignored the October 13, 1991 demand letter. He did not exercise "such diligence as the great majority of persons would use in the same or similar circumstances." *Id.* at 167, 162-163.[8]

In our case, similarly, the trial court properly ruled as a matter of law that the plaintiff had failed to exercise reasonable diligence. Where it is undisputed, as here, that the plaintiff has always known of the identity of the

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[8] The court of appeals, similarly, has held that a court may rule as a matter of law that a plaintiff failed to exercise reasonable diligence in discovering her claim. *See, Groom v. Professional Ins. Co.*, 179 Wis. 2d 241, 249, 507 N.W.2d 121 (Ct. App. 1993); *Awve v. Physicians Ins. Co.*, 181 Wis. 2d 815, 823, 512 N.W.2d 216 (Ct. App. 1994).

alleged tortfeasor and of the alleged tortious acts, the plaintiff's claimed inability to discover the nexus between her emotional harm and the breach of duty is immaterial. By failing to act on the awareness of the alleged breach for 27 years, the plaintiff, like the plaintiff in *Hennekens*, failed to exercise reasonable diligence, and the trial court was entitled to so rule.

Courts in other jurisdictions, moreover, have refused to apply the discovery rule to toll the statute of limitations in cases involving allegations of sexual abuse because sexual abuse is the kind of tortious conduct which, as a matter of law, causes sufficient harm when it occurs to create a duty to investigate and institute suit. *See Marsha V. v. Gardner*, 281 Cal. Rptr. 473, 477, 231 Cal. App. 3d 265 (Cal. App. 1991) (Discovery rule did not apply where the plaintiff remembered sexual abuse, but alleged that her discovery of the psychological injuries and the causal link between the abuse and those injuries was delayed. The plaintiff remembered the abuse and therefore knew of a very real harm all along, and the fact that she was unaware of *additional* harm "only created uncertainty as to the amount of damages and did not toll the period of limitations."); *E.J.M. v. Archdiocese of Philadelphia*, 622 A.2d 1388 (Pa. Super. 1993); *DeRose v. Carswell*, 242 Cal. Rptr. 368, 196 Cal. App. 3d 1011 (1987).

In *E.J.M.*, the plaintiff alleged that he had been abused by a priest from 1976, when the plaintiff was 14, through 1981. 622 A.2d at 1389. The plaintiff did not sue until 1989, however, claiming that he did not become aware of the psychological and emotional injuries until 1988. *Id.* The *E.J.M.* court held that the plaintiff's claims were barred by the two year statute of limitations, even

under the discovery rule, explaining that the plaintiff could have (and should have) known of the injury:

> This is simply not a case where the plaintiff, despite the exercise of objectively measured reasonable diligence, *could not* know of his injury and its cause within the limitations period. *Id.* at 1394 (emphasis in original).

The plaintiff's claim was barred because he had not met his duty to investigate the problems resulting from the abuse. *Id.*

In *DeRose*, similarly, the court refused to apply the discovery rule to a situation where the plaintiff was always aware that she had been abused, explaining that the rule is designed to remedy situations where injury is inflicted without perceptible trauma. *DeRose*, 242 Cal. Rptr. at 371. Sexual assault or abuse is not such a situation, however, because the abuse causes harm as a matter of law when it occurs – it is not imperceptible like the bad medical device in *Hansen*. *Id.* at 371. A plaintiff who always recalls the abuse always knows of *some* harm, and who caused that harm, and therefore cannot claim that she did not or could not discover her cause of action.[9]

The *DeRose* decision is consistent with this Court's recent decision in *Byrne v. Bercker*, 176 Wis. 2d 1037, 501

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[9] *See also Doe v. R.D.*, 417 S.E.2d 541 (S.C. 1992) (Discovery rule did not apply where plaintiff was aware of sexual abuse all along. The rule does not toll the statute until the plaintiff knows the full extent of his injuries, only until he knows he was injured.); *E.W. v. D.C.H.*, 754 P.2d 817, 820 (Mont. 1988) (plaintiff who always knew she had been abused could not avail herself of the discovery rule because she had a duty to inquire into the injury).

N.W.2d 402 (1993) dismissing sexual abuse claims on statute of limitations grounds on a motion for summary judgment. In *Byrne*, the plaintiff alleged that she had completely repressed all memories of sexual abuse, which had occurred in the 1940's, until 1986. The court held, without deciding whether her claim of repression tolled the running of the statute of limitations, that the cause of action accrued at least by 1986 when she was admittedly aware that the psychological injury she had been experiencing had been caused by the abuse that she had repressed. *Id.* at 1043. In *Byrne*, like *DeRose*, once the plaintiff was aware of the sexual abuse and an injury, she was aware of all facts necessary to bring her claim.[10]

In this case, the Court should affirm the trial court's dismissal on statute of limitations grounds because, as a matter of law, in the exercise of reasonable diligence, the plaintiff *should* have discovered her claims. The plaintiff had constant knowledge of the alleged tortious act, the identity of the tortfeasor and at least some awareness of injury, and the court was therefore entitled to rule that plaintiff had failed to exercise reasonable diligence in connecting her injury to the alleged tortious acts.[11] In this

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[10] A claim that the plaintiff allegedly discovered the connection while in therapy, moreover, is no reason for tolling the statute of limitations. A plaintiff need not be informed by a psychologist or some other expert that the abuse caused the injury before the statute of limitations starts to run. *Clark v. Erdmann*, 161 Wis. 2d 428, 448, 468 N.W.2d 18 (1991); *Fritz v. McGrath*, 146 Wis. 2d 681, 690, 431 N.W.2d 751 (Ct. App. 1988); *see also Byrne*, 176 Wis. 2d at 1047.

[11] Several other trial courts have dismissed similar cases on similar grounds. Two similar cases fully briefed before the court

case, as in the cases from other jurisdictions cited above, the plaintiff was put on notice by the alleged tortious

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of appeals were dismissed at the trial court level on statute of limitations and public policy grounds. In *John MMM Doe v. Archdiocese of Milwaukee*, Appeal No. 94-0695, the plaintiff claimed to have been sexually abused between 1965 and 1967, and to have repressed all memory of the abuse until 1992. The trial court, the Honorable John E. McCormick, held that the claim was barred because the plaintiff had failed to take reasonable steps to discover the injury, and also held that permitting a claim to proceed after the passage of 28 years clearly violated public policy. (Orders for all decisions cited in this note appear in petitioner's appendix.) In *John BBB Doe v. Archdiocese of Milwaukee, et al.*, Appeal No. 94-0423, the plaintiff claimed to have been sexually abused between 1965 and 1969, and also claimed to have repressed all memory of the abuse until 1992. The trial court, the Honorable Laurence G. Gram, Jr., dismissed the claim as barred by the statute of limitations.

Six other cases were recently dismissed on statute of limitations and/or public policy grounds and are currently being appealed. On June 20, 1994, Judge John E. McCormick dismissed three cases as untimely on both statute of limitations and public policy grounds, as well as for failure to state a claim. The court dismissed *A.C. v. Archdiocese, et al.*, Appeal No. 94-2141, where the plaintiff claimed to have been abused in 1978 but did not sue until 1994; *T.C. v. Archdiocese, et al.*, Appeal No. 94-2124, where the plaintiff claimed abuse from 1980 through 1987, and sued in 1993; and *J.J. v. Archdiocese, et al.*, Appeal No. 94-2128, where the plaintiff claimed abuse in 1968, and sued in 1994. Similarly, Judge Laurence C. Gram, Jr., in *J.K. v. Archdiocese, et al.*, Appeal No. 94-2145, dismissed as untimely and on public policy grounds a claim by a plaintiff who alleged that he had been abused from 1966 to 1968, but did not sue until 1994. Judge Michael Barron in *T.K. v. Episcopal Diocese, et al.*, Appeal No. 94-2270, dismissed a 27 year old claim on statute of limitations and public policy grounds. Finally, Judge Frank T. Crivello in *Susan Smith v. Archdiocese, et al.*, Appeal No. 94-2384, likewise dismissed a 25 year old claim as untimely and on public policy

conduct of the need for action, and if she failed to discover her claims for 27 years, she also failed to exercise reasonable diligence.

II. THE TRIAL COURT ALSO PROPERLY DISMISSED THIS DECADES-OLD CLAIM ON PUBLIC POLICY GROUNDS.

This court should also affirm the trial court's dismissal because, as a matter of public policy, claims that are brought 27 years after the alleged tortious conduct should not be permitted to go forward. The court of appeals reversed the trial court's dismissal on policy grounds, finding that the trial court should not have reached this issue on a motion to dismiss. The court of appeal's decision should be reversed, however, because the trial court was within its authority and acted properly by dismissing this action on policy grounds.

In a recent decision, *Bowen v. Lumbermen's Mut. Cas. Co.*, 183 Wis. 2d 627, 654, 517 N.W.2d 432 (1994), this Court held that when public policy issues are presented on the pleadings, the trial court (and this Court) may make its determination on public policy grounds before trial. In *Bowen*, the Court held that a mother who came onto the scene of her son's fatal injury after the accident could state a claim for negligent infliction of emotional distress, and ruled, reviewing a decision on a motion to

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grounds. In addition, Justice Ceci, sitting as a reserve judge, dismissed a claim for sexual contact allegedly occurring from 1961 to 1990 on statute of limitations and public policy grounds. *Roger Roe v. Archdiocese, et al.*, Case No. 92-CV-006387 (not appealed).

dismiss, that the claim was not barred on policy grounds. The court explained why, in that case, it was permissible to determine the policy issues on a motion to dismiss:

> In this case the court is determining public policy considerations before trial because the facts presented are simple, and because the question of public policy is fully presented by the complaint and the motion to dismiss. The question is whether, under the circumstances of this case, it contravenes public policy to permit Sharon Bowen to recover for severe emotional distress. *Id.* at 655.

In this case, similarly, Judge Bartholomew found that the facts were sufficiently simple and fully presented to permit a decision on public policy grounds on a motion to dismiss, noting that this case "does not require an evidentiary hearing to conclude that plaintiff's claim should be laid to rest on public policy and legal grounds." (App., p. 36). The court cited *Coffey v. Milwaukee*, 74 Wis. 2d 526, 540-42, 247 N.W.2d 132 (1976), which allows the court to deny recovery on public policy grounds, holding that to permit recovery on this stale claim would "make a mockery of our justice system." In *Coffey*, and more recently in *Meracle*, supra, this Court has explained that recovery may be denied on grounds of public policy when, among other reasons, allowance of recovery would (1) place too unreasonable a burden upon defendants, (2) be too likely to open the way for fraudulent claims, or (3) enter a field that has no just stopping point. *Coffey*, 74 Wis. 2d 526, 540-542; *Meracle*, 149 Wis. 2d 19, 31.

In this case, faced with allegations of conduct which allegedly occurred 27 years ago, given no concrete event which would clearly define when the statute should run *other* than at the point of the alleged sexual contact, and given the strong potential for fraud and blackmail in allowing such claims to proceed after decades, the trial court properly found that the action was barred on policy grounds. Allowing claims to proceed after the passage of 27 years based only on an alleged inability to connect the tort with the injury would, as the trial court found, violate the policies delineated in *Coffey* and *Meracle* by: (1) placing defendants in the nearly impossible position of attempting to defend allegations after memories have faded and witnesses have died; (2) opening the door to fraudulent claims, for the same reasons; and (3) entering a field that has no stopping point by leaving the statute of limitations devoid of meaning and impossible to enforce.

The public policy behind the discovery rule itself, moreover, clearly supports dismissal of such a decades-old claim. The purpose of statutes of limitation is to ensure prompt litigation of claims and to protect defendants and the courts from fraudulent or stale claims brought after memories have faded or evidence has been lost or become obscured. *See Korkow v. General Cas. Co.*, 117 Wis. 2d 187, 334 N.W.2d 108 (1984); *Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 206 N.W.2d 414 (1973); *Gutter v. Semandel*, 103 Wis. 2d 1, 24, 308 N.W.2d 403 (1981). The creation of the discovery rule was premised on a balancing of the public policies of discouraging stale and fraudulent claims on the one hand, and protecting the meritorious claims of litigants who have been as diligent as possible on the other. *See*

Hansen, 113 Wis. 2d at 558. Permitting a claim to proceed after passage of 27 to 33 years, therefore, violates the very public policy that led to the creation of statutes of limitation, especially in a case where the plaintiff always knew of the alleged tortious conduct.[12]

Public policy especially supports the dismissal of the claims against the Archdiocese in this case. In a case involving allegations of child sexual abuse, the California court explained, in language applicable here, why the statute of limitations should *not* be extended in claims against the employer, even though it is tolled for the claims against the perpetrator:

> It is one thing to extend a statute of limitations to the individual primarily responsible for the plaintiffs injuries, and another to apply an open-ended period of limitations to the employer of the assailant. To allow lawsuits based on an employer's negligence in hiring, training and retraining an employee years after the abuse is alleged to have occurred, and, in many cases, years after the assailant's employment has ended, would, we believe, have serious economic repercussions which would stifle business growth. More importantly, it would deny such defendants a meaningful opportunity to defend against such accusations.

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[12] The purpose behind the statute of limitations is especially served by dismissal in a situation such as this, involving extremely old claims. Not only have memories faded and key witnesses, such as Archbishop Cousins, passed away, but in fact some of these events occurred so long ago that the Archdiocese enjoyed charitable immunity when much of the alleged conduct occurred (up to 1963). *See Widell v. Holy Trinity Catholic Church*, 19 Wis. 2d 648, 121 N.W.2d 249 (1963).

Debbie Reynolds Professional Rehearsal Studios v. Superior Court., 25 Cal App. 4th 222, 30 Cal Rptr. 2d 514 (1994).

In our case, similarly, the public policy weighs heavily against permitting the plaintiff to pursue her 27 year old claims, especially against the Archdiocese, who would be deprived of the opportunity to present a meaningful defense after so much time. In fact, our legislature has given a clear statement of its public policy decision that a claim such as the plaintiff's should not survive for more than 15 years by enacting Wis. Stat. §§ 895.70(4) and 895.585.[13] In 1985, two years after *Hansen*, the Wisconsin legislature created a cause of action for sexual exploitation by a therapist (which includes clergy in some circumstances), § 895.70 stats., but deliberately cut off *all* rights for plaintiffs suing under that statute at a point *15 years* from when the statute would ordinarily expire. Section 893.585 requires an action to recover for sexual exploitation to be brought within three years after it accrues, allowing for delayed accrual under the discovery rule. *Id.* at § 893.585(1), (2). Under no circumstances, however, can the statute of limitations be extended by more than 15 years. *Id.*

In this case, therefore, the court should reverse the decision of the court of appeals and affirm the trial

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[13] This statute could not apply to the Appellant's claim, even if she had alleged a therapy relationship with Father Donovan, because it was not created itself until 1985, 20 years after the last alleged tortious act, and there is no evidence it was intended to apply retroactively. *See In Re Paternity of C.J.H.*, 149 Wis. 2d 624, 628, 439 N.W.2d 615 (Ct. App. 1989); *Schulz v. Ystad*, 155 Wis. 2d 574, 597, 456 N.W.2d 312 (1990).

court's dismissal on policy grounds. Contrary to the position taken by the court of appeals, the trial court was entitled to rule on the public policy issue on a motion to dismiss and, moreover, properly dismissed this decades old claim on public policy grounds.

III. IN THE ALTERNATIVE, THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DISMISSAL OF THE PLAINTIFF'S NEGLIGENT SUPERVISION CLAIM.

In addition to ruling that the plaintiff's claims were barred as untimely and on policy grounds, the trial court also dismissed the plaintiff's negligent supervision claim because this Court has not recognized the tort of negligent supervision. *See, e.g., Midwest Knitting Mills, Inc. v. U.S.*, 950 F.2d 1295, 1298 (7th Cir. 1991) ("The Wisconsin Supreme Court has never explicitly recognized this tort by holding an employer liable for the negligent retention or supervision of an employee"). The court of appeals reversed, holding that it had lawmaking power to recognize such a claim, and that the trial court should at least permit the issue to be tried.[14]

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[14] In a decision issued the same day, however, a different panel of the court upheld a trial court's dismissal of such a claim on the ground that this Court has never explicitly recognized the tort of negligent supervision. *Jane Doe v. Archdiocese of Milwaukee, et al.*, Appeal No. 93-2074, (App. p. 15). Both decisions are recommended for publication. Review was also sought in the Supreme Court in Appeal No. 93-2074, and it has been taken under advisement pending a decision in this case.

This Court should affirm the trial court's dismissal of the negligent supervision claim. Wisconsin has not and should not recognize such a claim in this context, both because the recognition of such a claim is precluded by the U.S. and Wisconsin Constitution and because recognition of such a claim would contravene established principles of law and public policy. If such a claim is recognized in Wisconsin, moreover, the court should nevertheless affirm the trial court's decision because the plaintiff cannot state such a claim where, as here, the underlying conduct was not tortious.

A. The First Amendment Of The U.S. Constitution And Article 1, Section 18 Of The Wisconsin Constitution Preclude The Creation Of A Tort Of Negligent Supervision In This Case.

The First Amendment of the United States Constitution and Article 1, Section 18 of the Wisconsin Constitution preclude the Court from recognizing the tort of negligent supervision in this context.[15] To support a negligent supervision claim, the plaintiff would have to establish that the Archdiocese was negligent in selecting or retaining Father Donovan, because he in turn was incompetent or otherwise unfit. *Midwest Knitting*, 950 F.2d at 1298. Because the courts cannot constitutionally

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[15] The Wisconsin Supreme Court has applied the United States Supreme Court's interpretation of the requirements of the establishment clause to Article 1, Section 18. *Freedom From Religion Foundation, Inc. v. Thompson*, 164 Wis. 2d 736, 742, 476 N.W.2d 318 (Ct. App. 1991).

determine what makes one competent or fit to act as a Catholic priest, the claim should not be recognized.

The United States Supreme Court has consistently held that the Free Exercise clause of the First Amendment prohibits government interference into issues surrounding the selection of clergy by religious institutions, since such selections involve legitimate religious beliefs. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) (it is the function of church authorities to determine what the essential qualifications of a clergy person are and whether the candidate possesses them). *See also Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 711-12 (1976), (*citing Gonzalez*); *Kedroff v. St. Nicholas Cathedral of Russian O. CH.*, 344 U.S. 94, 116 (1952) ("Freedom to select the clergy . . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.")[16]

The First Amendment also prohibits courts from determining whether religious authorities have negligently supervised clergy because such a determination involves the excessive entanglement of civil authorities in religious matters. *Schmidt v. Bishop*, 779 F. Supp. 321

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[16] *See also Olston v. Hallock*, 55 Wis. 2d 687, 201 N.W.2d 35 (1972) (court could not constitutionally review a religious institution's decision to terminate a minister); *Black v. St. Bernadette Congregation*, 121 Wis. 2d 560, 565, 360 N.W.2d 550 (Ct. App. 1984) (matters of internal church government are at the core of ecclesiastical affairs and as such are beyond the province of judicial review); *Rayburn v. General Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985) *cert. denied* 478 U.S. 1020 (1986) (the right to choose clergy without government restriction underlies the well-being of religious community).

(S.D.N.Y. 1991). In *Schmidt*, the plaintiff alleged that religious authorities had negligently supervised a pastor who had initiated sexual contact during a counseling relationship. The court held that the First Amendment prohibited it from determining whether the ecclesiastical authorities negligently supervised the pastor, due to the problem of excessive entanglement:

> Any inquiry into the policies and practices of the church defendants in hiring or supervising their clergy raises the same kinds of First Amendment problems of entanglement discussed above, which might involve the court in making sensitive judgments about the propriety of the church defendant's supervision in light of their religious beliefs.
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> * * *
>
> It would therefore also be inappropriate and unconstitutional for this court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.

Id. at 332.

Similarly, in *Dausch v. Rykse*, 1993 U.S. Dist. Lexis 1448, *20 (N.D. Ill), *aff'd* 1994 U.S. App. Lexis 30603, ___ F.3d ___ (7th Cir. 1994), a federal court applying Illinois law ruled that a similar negligent supervision claim failed, among other reasons, because of the potential for excessive entanglement. The court ruled that a negligent supervision claim against a religious institution failed,

first, because the plaintiff had failed to allege that the defendants knew of the necessity and opportunity to exercise control over the clergyperson. The court also dismissed the claim, moreover, as barred by the First Amendment:

> Any inquiry into the policies and practices of church defendants in hiring or supervising their clergy is barred by the First Amendment because it might foster excessive state entanglement with religion. *Id.* at *20.

The Seventh Circuit recently affirmed this decision without specifically addressing whether such a claim is barred by the First Amendment. In a dissent, however, Judge Ripple argued that, while an inquiry could be made into the church's decision to employ the clergyman in a purely secular capacity – as a psychotherapist – no inquiry could constitutionally be made into the decision of the church defendants to retain the clergyman to perform services in any way religious in nature.

In our case, similarly, the Court would invite excessive entanglement of the state into religious matters by permitting a court to review the sufficiency of the Archdiocese's supervision of its priests, and this Court should therefore refuse to recognize a claim for negligent supervision under these circumstances. Wisconsin has already recognized that it cannot constitutionally review the decision of a religious institution to terminate a minister (*Olston v. Hallock*, 55 Wis. 2d 687, 698, 201 N.W.2d 35 (1972)) and, similarly, the court cannot constitutionally review the decision to hire, or how to supervise, a priest. The trial court is not equipped, nor should it be required,

to inquire into the essential characteristics of a priest or how the Church should screen and supervise its clergy.

B. The Court Should Refuse To Recognize A Negligent Supervision Claim In This Context On Policy Grounds.

The Court should also refuse to recognize this tort on public policy grounds. The fundamental principal [sic] of Wisconsin negligence law is that a tortfeasor is fully liable for all foreseeable consequences of his acts, except as those consequences are limited by policy factors. *Citizens State Bank v. Timm, Schmidt & Co.*, 113 Wis. 2d 376, 386, 335 N.W.2d 361 (1983). In this case, negligent supervision claims should not be recognized because recognition would contravene the public policy as embodied in the law of respondent [sic] superior, and because the Archdiocese should not be held to a standard which would require it to foresee that its employees would act outside the scope of their employment.

As the court of appeals properly held in this case, a priest who engages in sexual contact with a parishioner is plainly acting outside the scope of his employment, and the Archdiocese should therefore not be held liable for that conduct. The courts have created the doctrine of respondeat superior to hold employers liable for their employees' torts, but they have further carved out an exception to that liability where the employee acts outside the scope of the employment. That exception represents a policy decision to cut off vicarious liability at a certain point, and a realization, perhaps, that activity which is outside the scope of employment is also not

foreseeable to the employer. To hold the employer liable on a different theory for the same acts would undermine that policy. *See also Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans*, 32 F.3d 953 (5th Cir. 1994) (employers do not have a duty to supervise their employees when the employees are off duty, nor do they have a duty to uncover an employee's concealed or clandestine acts).

C. The Plaintiff Cannot State A Claim For Negligent Supervision Because The Underlying Conduct Of The Priest Was Not Tortious.

Even if the court recognizes a claim for negligent supervision, it should nevertheless hold that the plaintiff has failed to state such a claim because the underlying conduct of Father Donovan was not tortious.

The plaintiff cannot succeed on a claim for negligent supervision absent proof that the underlying conduct of Father Donovan was tortious. *See Strock v. Pressnell*, 527 N.E.2d 1235, 1244 (Ohio, 1988) (a claim of negligent supervision cannot be maintained against the master unless the servant is individually liable for a tort against the third person); *accord Bladen v. First Presbyterian Church*, 857 P.2d 789, 797 (Okla. 1993); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993).

In *Schieffer*, the Nebraska supreme court found that similar allegations, in that case a 7 year adult relationship, failed to state a supportable tort claim:

> What is involved in this case is conduct between consenting adults. There are no allegations that the defendant used force or fraud to accomplish

> his sexual relations with the plaintiff during the period from 1982 to 1989. The amended petition does allege that the plaintiff was "vulnerable" because of prior emotional problems. This allegation falls far short of alleging that the plaintiff was incapable of consenting to what took place. *Id.* at 718.

The court concluded that the plaintiff had not stated a tort claim against the defendant priest, and accordingly could not state a claim for negligent supervision against the church.

While the plaintiff in this case takes pain to keep her allegations ambiguous, like the plaintiff in *Schieffer*, she does not allege a supportable tort theory against Father Donovan. The plaintiff alleges that Fr. Donovan was a priest and used *"said relationship and his position as a priest* to force and coerce the plaintiff to have a sexual relationship, without her consent." [*Am. Complaint* at ¶ 9 (emphasis added)]. The plaintiff is not alleging a sexual assault, but rather is alleging that one adult convinced another adult to have sexual relations.

The plaintiff's allegations of a six year sexual relationship between two adults which was allegedly held together by the mental influence of one person over the other does not state a claim under any tort theory. The statutory cause of action for sexual exploitation by a therapist, even if it applied to allegations such as plaintiff's in general, cannot apply to this case because the statute was not created until 1985. *See supra* note 13. Causes of action for breach of contract to marry, alienation of affections and criminal conversation which *accrued* after 1971 were abolished by Wis. Stat. § 768.01, and any

claim under these theories is either abolished, if it accrued upon discovery in 1992 as alleged, or untimely, if it accrued earlier. *See generally Koestler v. Pollard*, 162 Wis. 2d 797, 471 N.W.2d 7 (1991). The plaintiff does not even state a claim for the common law action of seduction, because that claim requires allegations of a false or fraudulent representation. *See Slawek v. Stroh*, 62 Wis. 2d 295, 312-13, 215 N.W.2d 9 (1974).

Not only have these specific common law claims for adult sexual relations long since been abolished, moreover, but the legislature and the courts have made it clear that all similar claims are also abolished. In *Koestler*, for example, the court refused to allow the plaintiff to maintain a claim for intentional infliction of emotional distress arising out of an adult relationship. The court noted that the public policy underlying the legislature's abolition of claims under § 768.01 "dictates that the courts should not administer heart balm in the form of civil liability," and held that the plaintiff's claim violated that public policy by embroiling the courts in disputes in which judicial intervention is inappropriate. *Id.* at 802-804. In our case, similarly, the plaintiff's claims arising out of an adult relationship fail to state a claim, and her negligent supervision claim fails as well.

D. If A Negligent Supervision Claim is recognized Under These Circumstances, The Elements Must Include Proof That The Archdiocese Knew, Prior To The Alleged Tortious Conduct, That The Individual Priest Had Committed A Similar Bad Act.

Finally, if Wisconsin is to recognize a claim for negligent supervision against religious institutions, it is important that this Court clearly define the elements of such a claim. While the court of appeals remanded for a trial on this issue, it did so without providing guidance to the trial court on the elements of such a claim. This Court should hold, at a minimum, that prior notice of similar bad acts is an element of a claim for negligent supervision against a religious institution, and that the allegation must be specifically pled.

Jurisdictions which recognize a claim for negligent supervision against a religious institution also require the plaintiff to plead, with specificity, facts showing that the institution had prior knowledge of similar bad acts, due to the myriad of First Amendment problems which accompany such a claim:

> In order to survive a Civ. R. 12(b)(6) motion to dismiss, a plaintiff bringing a negligent hiring claim against a religious institution must plead operative facts with particularity. Specifically, plaintiff must plead facts which indicate that the individual hired had a past history of criminal, tortious, or otherwise dangerous conduct about which the religious institution knew or could have discovered through a reasonable investigation.
>
> . . .

> As with fraud claims and intentional tort claims against employers, an important principle underlies our decision to require that the plaintiff plead operative facts with particularity. In order to determine whether a religious organization has exercised due care in hiring, it is necessary to examine its employment policies and practices. In all probability, these practices will be infused with the religious tenets of the particular sect involved. If the state becomes involved in assessing the adequacy of these standards, serious entanglement problems may arise under the First Amendment.

Byrd v. Faber, 565 N.E.2d 584, 589-90 (Ohio 1991); *See also Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans*, 32 F.3d 953 (5th Cir. 1994) (to support an independent negligence claim against the religious institution, the plaintiff must show that the defendants knew or suspected that the clergyman had engaged in sexual impropriety or might do so in the future); *Thompson v. Everett Clinic*, 71 Wash. App. 548, 860 P.2d 1054 (1993) (employer may be held liable for negligent supervision if it had prior knowledge of the dangerous tendencies of its employee); *See generally Rolph v. EBI Co's.*, 159 Wis 2d 518, 532, 464 N.W.2d 677 (1991) (a defendant's duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone).

If the Wisconsin courts are to recognize a negligent supervision claim against religious institutions, similarly, the Court should require some specific allegation demonstrating that the religious institution knew that the employee had a prior history of similar tortious conduct. While Wisconsin is a "notice pleading" state, greater

specificity has been required in libel cases due to First Amendment concerns, and greater specificity should likewise be required here.

CONCLUSION

For all the reasons set forth above, this Court should affirm the trial court's decision in all respects.

Dated this 22d day of November, 1994.

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SUPREME COURT OF WISCONSIN

JUDITH M. PRITZLAFF,

Plaintiff-Appellant,

v.

ARCHDIOCESE OF MILWAUKEE,

Defendant-Respondent-Petitioner,

REVEREND JOHN T. DONOVAN,

Defendant-Respondent,

ARIZONA HEALTH CARE COSTS CONTAINMENT SYSTEM AND HEALTH CARE FINANCING ADMINISTRATION,

Defendants.

DISTRICT I
Case No. 93-1846
Trial Court Case No. 92-CV-016110

CERTIFICATE OF FORM AND LENGTH

I hereby certify that this petition conforms to the rules contained in § 809.19(8)(b)(c) for the brief and appendix produced with a mono spaced font. The length of this brief is 34 pages.

Dated this 22 day of November, 1994.

Signed: Kevin P. Crooks
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SUPREME COURT OF WISCONSIN

JUDITH M. PRITZLAFF,

Plaintiff-Appellant,

-vs-

DISTRICT I
Case No. 93-1846
Trial Court Case No.
92-CV-016110

ARCHIDIOCESE OF MILWAUKEE,
Defendant-Respondent
Petitioner,
REVEREND JOHN T. DONOVAN,
Defendant-Respondent,
ARIZONA HEALTH CARE COSTS CONTAINMENT SYSTEM AND HEALTH CARE FINANCING ADMINISTRATION,
Defendants.

BRIEF OF PLAINTIFF-APPELLANT JUDITH M. PRITZLAFF

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STATEMENT OF ISSUES

Issue No. 1: Does the discovery rule toll the running of the statute of limitations for 27 years in a case where the last tortious act allegedly occurred in 1965?

How Presented: Plaintiff-appellant Pritzlaff appealed a dismissal by the trial court, and the issue was briefed before the Court of Appeals.

How Decided: The Court of Appeals reversed the trial court, holding that it was error to conclude, applying the discovery rule, that plaintiff had failed as a matter of law to exercise reasonable diligence in discovering the connection between her injury and the alleged acts.

Issue No. 2: Did the trial court properly dismiss this claim on public policy grounds?

How Presented: Pritzlaff appealed an adverse ruling; briefed by the parties before the Court of Appeals.

How Decided: The Court of Appeals reversed the trial court, holding that a sufficient factual basis was not presented for considering, evaluating and resolving the public policy issues involved in this case.

Issue No. 3: Did the trial court properly dismiss a claim for negligent supervision against the Archdiocese of Milwaukee, on the basis that Wisconsin has yet to recognize such a claim?

How Presented: Pritzlaff appealed an adverse ruling; briefed by the parties before the Court of Appeals.

How Decided: The Court of Appeals reversed the trial court, holding that the Court of Appeals has lawmaking

power to recognize a claim for negligent supervision under these circumstances.

STATEMENT OF THE CASE

The plaintiff, Judith Pritzlaff, started this action in November of 1992, to recover for injuries arising out of sexual misconduct on the part of a Catholic priest, Reverend John T. Donovan. The forced sex occurred from 1959 to 1965. Pritzlaff first met Donovan in the late 1950's while she was in high school. Donovan was a priest and used that position to cultivate a friendship and later as an excuse to meet Pritzlaff. He eventually made sexual advances, ultimately, forcing her to have sex with him without her consent. The emotional trauma which resulted for Pritzlaff let her to suppress the incidents until April of 1992, when she was able to perceive the nature and cause of her emotional injuries.

Pritzlaff also joined the Archdiocese of Milwaukee as a defendant, asserting that it was negligent and liable for failing to properly supervise Donovan.

The trial court granted a motion to dismiss Pritzlaff's compliant [sic] for failure to state a claim, which had been jointly brought by Donovan and the Archdiocese. The trial court ruled that the claim was barred by the statute of limitations, on public policy grounds and, that Wisconsin had to recognize a claim for negligent supervision.

Pritzlaff appealed and the Court of Appeals found in her favor with regard to the aforementioned grounds. This Supreme Court should affirm the decision of District I.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT WITH REGARD TO TIMELINESS OF PLAINTIFF CLAIM.

The appellate court correctly reversed the trial court with regard to the timeliness. Pritzlaff, in her amended complaint, alleged that Donovan forced himself on her, without her consent. She did not file the action in the 1960's because of the trauma and psychological injuries inflicted upon her, suppressing the entire incident so as to allow her to cope with the incident itself. Upon discovery, she timely filed her action.

The trial court on a motion to dismiss for failure to state a claim must accept as true the allegations contained therein. Her complaint had to be liberally construed to accomplish substantial justice and, if reasonably possible, construe it to state a claim. *Paskeit v. Quality State Oil Co.*, 164 Wis.2d 800, 805, 476 N.W.2d 871, 873 (1991).

The trial court and the Archdiocese both characterize Donovan's conduct as being consensual. (Petitioner's Appendix p. 38). They apparently misunderstood the meanings of force, coercive and without consent. Clearly, forced, non-consensual sex is a tort. And as a tort is subject to the "discovery rule", namely, " . . . tort claims shall accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first". *Hansen v. A.H. Robins Co.*, 113 Wis.2d 550, 560, 335 N.W.2d 578, 583 (1983).

Discovered in April of 1992, filed in November, plaintiff's claim should not be barred. That is, unless you

can rule that plaintiff failed to exercise reasonable diligence to discover her injury and its cause. Without one iota of evidence in the record, the trial court did just that. The trial court matter of factly rejected plaintiff's claim, without a hearing, with no evidence presented for or against her. Without some type of inquiry, how can a trial court determine whether Pritzlaff exercised or failed to exercise reasonable diligence? Some inquiry is absolutely essential. The clock starts ticking when the victim knows of her injury, its nature and who caused it. *Byrne v. Becker*, 176 Wis.2d 1037, 1047, 501 N.W.2d 402, 406 (1993). The complaint says April of 1992 and at this stage must be accepted as true. The trial court acted inappropriately, dismissing the action without a complete determination of the facts.

II. PLAINTIFF'S CLAIM SHOULD NOT BE DISMISSED ON PUBLIC POLICY GROUNDS.

To adopt the position of the Archdiocese would be contrary to long standing, well reasoned case law. An insufficient factual basis exists for a court to make a summary ruling concerning public policy considerations. there exists no record to support the Archdiocese's claim of prejudice. No record exists to demonstrate that memories have faded, records were lost or that witnesses are no longer around. Why can't they present a meaningful defense? Without a hearing, giving the plaintiff an opportunity to challenge broad assertions of prejudice, any summary proceeding would be necessarily suspect. This Court has recognized that principle. In *Haas v. Chicago & N.W.R.R. Co.*, 48 Wis.2d 321, 326-27, 179 N.W.2d 885, 880

(1970), the Court stated, " . . . where the issues raised are so complex, or the factual connections so attenuated, a full trial must precede the court's determinations." Public policy issues should only be considered after a complete factual determination is made at the trial court level. Nothing has been offered to show Pritzlaff was not diligent or that her claim is fraudulent. The statute of limitations would still have meaning and be enforceable, just start counting when the discovery was made.

III. THIS COURT SHOULD AFFIRM THE APPELLATE COURT'S RECOGNITION OF PLAINTIFF'S NEGLIGENT SUPERVISION CLAIM.

Wisconsin, though not explicitly, does recognize the tort of negligent supervision and it should be extended to a religious body. From *Kamp v. Coxe Bros. & Co.*, 122 Wis. 206 (1904) on, we have held employers liable for the negligent retention or supervision of an employee. The tort of negligent supervision was properly pled by Pritzlaff and should not be discarded, even if it requires this Court to act when it has not done so before. To give the Archdiocese the protection they claim, would be tantamount to allowing it ordain a known sexual predator and let him prey upon parishioners. At some point, the general good will, health and safety of the public must be considered.

Plaintiff is in agreement that once this Court recognizes claims for negligent supervision, guidance as to its elements should also be provided for future cases. As the Archdiocese points out, other jurisdictions have acted in

this area and the Catholic church and the Free Exercise clause of the First Amendment have survived.

CONCLUSION

In the interest of justice and fundamental fairness, plaintiff should have been allowed to at least present evidence demonstrating the crippling effect of the injuries sustained and steps taken by her to discover the cause of those injuries. Then the trial court could have made a determination as to whether it was reasonable or not.

Plaintiff's action against the Archdiocese should not have been barred by the statute of limitations without an evidentiary hearing as to the reasonableness of her efforts to discover the cause of her injuries.

The Archdiocese should not be allowed to escape its responsibilities to the appellant. The Archdiocese was responsible for recruiting Fr. Donovan, training him and perhaps, most importantly, screening him to determine whether or not he was the type of person capable of putting aside natural urges.

The Archdiocese failed to find that Donovan was incapable of setting aside those urges and allowed him to gravitate around young, impressionable teenage girls. They allowed him to cultivate friendships and in this specific case take that friendship as an excuse to chase down the appellant and satisfy those urges at her expense. All this was accomplished without any regard to the emotional trauma caused appellant and far reaching

ramifications on her life. By not having appropriate safeguards to ferret out candidates like Donovan, the Archdiocese breached its duty to appellant and others to present a priest who is totally committed to the teachings of their faith. As a direct result of that breach, appellant was caused great injury and harm, injuries and harm she still suffers.

The Archdiocese was negligent in allowing Donovan to acquire his position and use that position to meet and select a victim, the plaintiff.

The ruling of the Appellate court should stand.

Dated at Milwaukee, Wisconsin this 27th day of Dec., 1994.

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SUPREME COURT OF WISCONSIN

JUDITH M. PRITZLAFF,

Plaintiff-Appellant,

v.

Case No: 93-1846

ARCHDIOCESE OF MILWAUKEE,

Defendant-Respondent-Petitioner,

REVEREND JOHN T. DONOVAN,

Defendant-Respondent,

ARIZONA HEALTH CARE COSTS CONTAINMENT SYSTEM AND HEALTH CARE FINANCING ADMINISTRATION,

Defendants.

PLAINTIFF-APPELLANT'S MOTION FOR RECONSIDERATION

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MOTION

Plaintiff-Appellant Judith M. Pritzlaff (Plaintiff) respectfully moves the Court, pursuant to § 809.64, Stats., to reconsider its decision in the above-captioned action, dated June 27, 1995 on the grounds that:

1. The United States Supreme Court has expressly held that a religious organization, like the Catholic Church, is not protected from civil responsibility for its secular activities by the First or Fourteenth Amendments to the U.S. Constitution. *General Council on Finance and Administration of the Methodist Church v. Superior Court of California*, 439 U.S. 1369, 99 S. Ct. 35, 58 L.Ed.2d 63 (1993).

2. The Court should craft an exception to its ruling with regard to the commencement of the running of the statute of limitations for childhood sexual abuse by a priest or other person in a position of trust and authority over the child as this Court has recognized exists in an incest context. *Opinion*, pp. 15-16.

3. If the Wisconsin Supreme Court is nonetheless concerned about the opportunity for fraudulent claims where a claim of sexual abuse of a child by a person in a position of trust and authority over the child is presented when the child is an adult, the Court should consider imposing a rule such as has been imposed in other jurisdictions that requires corroborative evidence that the sexual assault occurred. See *Meiers-Post v. Schafer*, 170 Mich. App. 174, 427 N.W.2d 606 (1988).

4. The rule enunciated in this *Opinion* regarding the commencement of the running of the statute of limitations should apply prospectively only since there has

been great reliance by plaintiff and many other claimants on the rule as articulated in *Hammer v. Hammer,* 142 Wis. 2d 257, 418 N.W.2d 23 (Ct. App. 1987), *rev. denied,* 144 Wis. 2d 257, 418 N.W.2d 23 (1987) and *Byrne v. Bercker,* 176 Wis. 2d 1037, 501 N.W.2d 402 (1993) and since it changes the law of *Hammer* and *Byrne. Steinberg v. Jensen* Case No. 92-2475, ___ Wis. 2d ___, ___ N.W. 2d ___ (filed June 30, 1995), at note 23.

5. In addition, although Plaintiff at all times knew the role of Defendant-Respondent Donovan (Donovan) in her alleged sexual abuse, she did not know and could not have known the role of Defendant-Respondent Archdiocese of Milwaukee (Archdiocese) in causing her injury, as she has alleged, until at least the commencement of her action.

ARGUMENT

1.

THE UNITED STATES SUPREME COURT HAS EXPRESSLY RULED THAT RELIGIOUS ORGANIZATIONS ARE NOT INSULATED FROM STATE SCRUTINY OF THEIR SECULAR ACTIVITIES BY THE FIRST OR THE FOURTEENTH AMENDMENTS.

In the majority's recent *Pritzlaff* opinion, the Court accepted, for purposes of this appeal, that the tort of negligent supervision exists in this state, but barred its application to the facts of this case. The Court concluded "that the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation

of church canons and internal church policies and practices." Majority op. at 21. However, the U.S. Supreme Court has expressly ruled that religious organizations are *not* protected by the First or Fourteenth Amendments for responsibility for their secular activities. We draw the Court's attention to *General Council on Finance and Administration of the United Methodist Church v. Superior Court of C.A., County of San Diego,* 439 U.S. 1355, 99 S.Ct. 35, 58 L.Ed.2d 63 and 77 (1978).

In *General Council,* an Illinois religious organization argued that a state court's jurisdictional analysis improperly violated the First and Fourteenth Amendments to the U.S. Constitution by examining the internal structure of the church. The defendant in *General Council* cited previous authority where the Supreme Court rejected efforts to intrude into intra-church disputes. *General Council,* 439 U.S. at 1370. Justice Rehnquist explained, though, that legal actions arising out of secular disputes, even if involving internal church matters, would not be violative of the U.S. Constitution:

> In my view, *applicant plainly is wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units* in an action such as this. There are constitutional limitations. . . . [b]ut this Court has never suggested that those restraints similarly apply outside the context of such intraorganization disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by the applicant are not in [sic] point. Those cases are premised on a perceived danger

> that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. (citation omitted). *Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization,* in which fraud, breach of contract, and statutory violations are alleged. As the Court stated in another context: "Nothing we have said is intended to even remotely imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public." *Cantwell v. Connecticut,* 310 U.S. 296, 306, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (emphasis added).

General Council, 439 U.S. at 1372-73.

Thus, the Supreme Court has explicitly rejected attempts to preclude an action initiated by a third party against a religious body merely because some inquiry into church practices is required. Similarly, here the Plaintiff's allegations of wrongdoing on the part of the Archdiocese do not require inquiry into the "intraorganization" matters of the Archdiocese or the Catholic Church. The Plaintiff's allegations in her Complaint, assumed to be true for the purposes of the appeal *Wamser v. Bamberger,* 101 Wis. 2d 637, 305 N.W.2d 158 (1981), are that the Archdiocese failed to properly select, train and supervise an employee, not as a priest or for the performance of priestly duties but as an "employee and agent of the Archdiocese . . . likely to come into contact with teenage girls/ young women in the community within the Archdiocese." Pet. App. 28-29. Plaintiff's complaint is that the Archdiocese failed in its duty to act properly in its interaction with the public. This is secular activity, the

necessary dealings that even a religious organization must conduct with the public day to day in order to function in a community. Its buildings must meet applicable building codes. Its employees, including clerics, must pay taxes. They must operate their cars according to the traffic regulations. Even its bingo games are regulated by the state. Sec. 563.11, Stats. Certainly the manner in which a religious organization chooses to expose women and children in the community to its employees is no less secular and is thus subject to civil and criminal scrutiny.

If religious organizations are protected by the First and Fourteenth Amendments from scrutiny of the manner and method by which they place their employees and agents in the community to deal with women or children they meet in the public community, the very serious consequences of such a policy should be considered.

In the context of the current *Opinion*, a church could escape civil liability for the sexual molestation of parishioners, even if young children were involved. A church could hire someone it knew was a pedophile or predatory sexual deviant, allow the individual private access to women or children without warning, and then fail to take corrective action once the abuse was known, at the same time evading civil liability. However, if a day care center engaged in similarly abhorrent conduct, it could face staggering financial penalties that would appropriately punish the facility and perhaps improve supervisory practices at other day care centers.

Similarly, to take the *Opinion* to its logical conclusion, a church could flaunt a host of laws that apply to the rest of society with virtual impunity. Religious bodies could

escape civil liability for employee conduct that could include gambling, discrimination, unfair labor practices, tax code violations, drug trafficking, pornography or any other illegal activity, since a civil action arising out of these activities would require an examination of internal church policies and practices. At the same time, though, the State would tightly regulate these activities in any other field and punish those entities whose employees violated the law and/or compensate the victims of any illicit conduct.

Finally, this Court must consider the possibility that pseudo-religious organizations, even cults, could shield themselves from civil liability for any number of activities. Though the majority noted in a footnote that almost all priests lead responsible lifestyles, their ruling is not limited solely to these priests. *Opinion* at 11, n.3. Rather, the concern lies with those clerics who deviate from a "responsible" lifestyle. Any religious body would receive comprehensive protection from civil suits that inquire into the conduct of their employees, even when these employees have engaged in atrocious activities. This Court should not establish such broad barriers to the imposition of liability.

2.

THE SUPREME COURT SHOULD CREATE AN EXCEPTION FOR ALL INSTANCES OF SEXUAL ABUSE OF A CHILD BY PERSONS IN A POSITION OF TRUST AND AUTHORITY OVER THE CHILD.

The judicial system in Wisconsin contains many pending actions alleging sexual abuse by perpetrators of

numerous descriptions claimed by victims of numerous descriptions. This Court's *Opinion* in this action dated June 27, 1995 will have far-reaching effects on these cases. If read broadly, this Court's *Opinion* can be construed to mean that any victim of sexual abuse has the statute of limitations commence to run on the day the victim is aware that forced sexual contact took place, regardless of the age of the victim and/or the circumstances of the perpetrator's relationship to the victim.

However, the *Opinion* also suggests, at pp. 15-16, a must more limited reading, inferring that a victim claiming sexual abuse as an adult has, as a matter of law, enough information at the time of the forced sexual contact to commence the running of the statute of limitations, but that where the sexual abuse is of a child by a perpetrator who has a relationship to the child such as a parent, the victim cannot, in equity, be charged with such knowledge:

> Further, because of these relationships and types of factual situations, and because of the age of the victims, oftentimes victims do not realize the wrongfulness of the acts. . . . Thus, for reasons of public policy, a special discovery rule has been created for these cases in an effort to provide adequate protection to children who "have been harmed because of a 'most egregious violation of the parents/child relationship.' " *Opinion*, at p. 16.

Many of the cases that presently exist in the Wisconsin judicial system involve claims by individuals who were sexually abused as a child by a person in a trust and

authority position over them, e.g. a parent, teacher, therapist, doctor, priest. If this Court intended to recognize at pp. 15-16 of its *Opinion* an exception to its ruling regarding the commencement of the running of the statute of limitations for persons alleging childhood sexual abuse by a parent, there is no logical or rational basis to distinguish between a child sexually abused by a parent and a child sexually abused by his or her parish priest, teacher or doctor. Each relationship potentially contains all of the elements of authority, trust and control over a child with the accompanying confusion and fear experienced by a child, as recognized by this Court at pp. 15-16 of its *Opinion*.

It is respectfully submitted that in the interest of clarity and the efficient administration of justice, this Court should clarify its *Opinion* to state that victims of childhood sexual abuse inflicted by a person in a position of trust and authority over the child are not required to apply the statutes of limitations until the victim reaches a stage in life when the fact-finder believes that he or she knows the nature of his or her injury, the cause of his or her injury and the defendant's part in that cause. *Borello v. U.S. Oil Company*, 130 Wis. 2d 397, 414, 388 N.W.2d 140 (1986).

3.

IF CONCERNS ABOUT FALSE CLAIMS REMAIN, THIS COURT SHOULD CONSIDER ADDING A REQUIREMENT OF CORROBORATION OF THE ASSAULT.

If this Court is nonetheless concerned that victims of childhood sexual abuse by persons of trust and authority over them who bring their claims years later after they have reached adulthood may allow for the bringing of fraudulent claims, the Court may wish to consider imposing an additional requirement of proof in such cases that the victim have corroborative evidence of such assault. For example, see *Meiers-Post, supra* at p. 176.

Plaintiff does not believe that such an additional requirement is necessary to prevent the successful presentation of fraudulent claims by persons alleging childhood sexual abuse by persons in positions of trust and authority. However, if this Court does desire such a protection, a requirement of corroborative evidence of the assault should satisfy any such concern.

4.

THE RULE IN *PRITZLAFF* SHOULD APPLY PROSPECTIVELY ONLY.

The judicial system in Wisconsin has a substantial number of actions that have been brought by individuals claiming sexual abuse as children or as adults by perpetrators of all descriptions. Prior to this action, the opinions in *Hammer, supra* and *Byrne, supra* had been relied upon by these claimants and by many trial courts. This court has the authority, if it wishes, to modify the rulings

in *Hammer* and *Byrne*. However, where there has been great reliance upon decisions that are now being overruled or modified, it is the better practice to make a ruling which modifies or overrules prior decisions prospective only. *Rollo v. Goers*, 174 Wis. 2d 709, 497 N.W.2d 724 (1993).

The *Opinion* in this action at least modifies *Hammer* and *Byrne* to limit their application to circumstances other than a party claiming sexual abuse as an adult. To the extent this has changed the law of *Hammer* and *Byrne*, the *Opinion* should be prospective only. *Steinberg v. Jensen*, Case No. 92-2475, ___ Wis 2d ___, ___ N.W. ___ (Filed June 30, 1995) It is respectfully submitted that this Court should declare that its *Opinion* dated June 27, 1995 applies prospectively only to causes of action which accrue after June 27, 1995.

5.

THE PLAINTIFF COULD NOT HAVE KNOWN OF THE ARCHDIOCESE'S ROLE IN CAUSING HER INJURY; CONSEQUENTLY, THE STATUTE OF LIMITATIONS COULD NOT HAVE BEGUN TO RUN.

The Plaintiff admits that she was always aware that Defendant-Respondent, John T. Donovan (Donovan), was the person who sexually abused her. Clearly, at all times from the date of the forced sexual contact by Donovan she was aware of that "defendant's part in that cause" of her injury. *Borello, supra* at p. 414. However, it is impossible to charge the plaintiff as of the date of such forced sexual contact with knowledge of the Archdiocese' [sic] "part in that cause" of her injuries. In most sexual abuse

cases, and in this sexual abuse case in particular, the plaintiff could not have known what the Archdiocese did or did not do to allow, encourage or support the assault upon her, as she has alleged, until much later, and perhaps not until the commencement of her lawsuit or thereafter during the course of discovery. Consequently, the statute of limitations should not begin to accrue against her as to the Archdiocese until she knew or can reasonably be expected to know of the Archdiocese's role.

The Archdiocese may respond that such a rule would only serve to support groundless suits against it started without a good faith basis in fact. However, the requirements of a good faith basis for filing an action and the sanctions that may be imposed under §§802.05(1)(a) and 814.025, Stats., as well as the availability of summary judgment under §802.08, Stats. are sufficient protections against such suits.

Consequently, while the Court's ruling that the statute of limitations commenced to run against the plaintiff at the time of the forced sexual contact may be correct as to Defendant Donovan, it is respectfully submitted that such an application is in error with respect to the defendant, Archdiocese of Milwaukee.

CONCLUSION

Upon the above argument and authority it is respectfully submitted that this Court should reconsider and modify its *Opinion* on June 27, 1995 to provide that:

1. A religious organization is not protected by the First or Fourteenth Amendments from state scrutiny of

the manner and method by which it hires, trains and supervises its employees and agents it intends will interact with women and children in the public communities it operates in.

2. An exception should be recognized that the statutes of limitation for sexual abuse of a child by a person in a position of trust or authority over the child, including parents, clerics, teachers, doctors and therapists, does not begin to run until the victim becomes aware of (1) the nature of his or her injury, (2) the cause of that injury, and (3) the particular defendant's part in that cause.

3. If the court feels an additional protection against fraudulent claims is wise, imposing in such cases of alleged sex abuse of a child a requirement of corroborating evidence of the assault.

4. The *Opinion* in this action applies prospectively only to causes of action which accrue after June 27, 1995.

Respectfully submitted this 17th day of July, 1995.

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